In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1581

ROBERT ALLEN BYRON, ROBERT FRANCIS PRUCHA, and ULYSSES MCGHEE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners challenge the validity of their arrests and the seizure of a pair of gloves from their vehicle.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on two counts of theft from an interstate shipment, in violation of 18 U.S.C. 659.[1] Petitioner Byron was sentenced to imprisonment for five years on each count; petitioner Prucha to six years on each count; and petitioner McGhee to seven years on each count. The sentences were concurrent. The Court of appeals affirmed (Pet. App.).

1. On May 26, 1971, at approximately 11:56 p.m., two sheriff's patrolmen of Kane County, Illinois, were called

[1]Co-defendant Edward J. Durkin entered a plea of guilty prior to trial and did not appeal.

to the Consolidated Freightways terminal in Aurora, Illinois, where company employees had interrupted an attempted theft from interstate freight shipments (Tr. 9). Shortly before reaching the terminal, the officers noticed a U-Haul van, Ford Model Econoline, with small tires and a sagging front end, parked at a bowling alley which was closed for business (Tr. 10). At the terminal, the officers were told that one of four men discovered unloading freight from one of the trailers had been captured, but the other three had escaped, running in the direction of the bowling alley. The three suspects were described as being a black man, tall and thin, wearing a small brimmed hat; a white man, with a receding hairline and bushy sideburns; and a second white man, described as "stocky" (Tr. 16, 42). In cooperation with officials of the adjoining Kendall County, the Kane County officers then drove to the bowling alley to investigate the U-Haul van that had been seen in the parking lot, but the van was no longer there. The two officers were instructed to continue searching the environs.

Subsequently, the officers noticed the taillight of a slow-moving vehicle on a nearby road. Although the posted speed limit on the road was sixty-five miles per hour, the vehicle was travelling at only twenty-five to thirty miles per hour. One officer noted that the vehicle had the distinctive taillights of a Ford Model Econoline and a U-Haul van, with small tires and a sagging front end (Tr. 19-22). It appeared to be the same van seen earlier at the bowling alley parking lot. Upon stopping the van for investigation, the officers noticed that the occupants were two white men and one black man (Tr. 23). The three men, whose identification showed that they were all from Chicago (Tr. 26), claimed

that they were looking for "vegetable stands," although the time was then approximately 1:00 a.m. (Tr. 25). Using a flashlight, one policeman noted that their shoes and pant legs were covered with mud, of the same general color as that found previously in the open field between the bowling alley and the Consolidated Freightways terminal. The officer then told petitioners that there had been an incident at the terminal and asked them to return there for purposes of determining whether they had been involved. Petitioners complied (Tr. 25), and the government conceded below that at this point all three were under arrest. At the terminal, another officer noticed a pair of muddy gloves in plain view in the front of the van while he was checking the serial number of the van (Tr. 126). The gloves were subsequently admitted into evidence at petitioners' trial (Tr. 576).

2. Petitioners contend that the initial detention was not permissible under *Terry* v. *Ohio*, 392 U.S. 1, and that the subsequent arrest was therefore unreasonable. However, the facts clearly justified stopping the van for investigatory purposes.

The van had been seen adjacent to the freight terminal during the theft attempt, had departed thereafter, and was being driven in the environs of the theft at one o'clock in the morning. "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry* v. *Ohio*, *supra*, 392 U.S. at 22. "A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing." *Wilson* v. *Porter*, 361 F.2d 412, 415 (C.A. 9); and see, *e.g.*, *United States* v. *Williams*, 416 F.2d 4 (C.A. 5), certiorari denied, 397 U.S. 910, 968; *United States* v. *Fallis*, 414 F.2d 772 (C.A.

9); *Bell* v. *United States*, 254 F.2d 82 (C.A.D.C.), certiorari denied, 358 U.S. 885. Here, the officers had ample grounds on which to stop the van for investigatory purposes.

Once the van had been stopped, what had been only a reasonable suspicion developed into probable cause to arrest. See *Sibron* v. *New York*, 392 U.S. 40, 66; *Chambers* v. *Maroney*, 399 U.S. 42. After questioning petitioners and receiving implausible answers, observing the mud on their clothes, and considering the other circumstances relating to the vehicle, the officers had probable cause to arrest petitioners. See *Henry* v. *United States*, 361 U.S. 98, 102. The seizure of the muddy gloves at the terminal following petitioners' arrest was also valid since they were observed in plain view while the officer was checking the serial number of the van. See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.